

No. 15374

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United States  
Court of Appeals  
for the Ninth Circuit

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RICHARD E. BENNETT, Administrator of the  
Estate of EVELYN E. BENNETT, Deceased,  
Appellant,

vs.

ARCTIC INSULATION, INC., and DELBERT  
E. BOYER, Agent, etc.,  
Appellee.

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Transcript of Record

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Appeal from the District Court  
for the District of Alaska,  
Fourth Judicial Division

FILE

MAR 29 1957

PAUL P. O'BRIEN



No. 15374

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

ROBERT A. PARRISH,  
544½ Second Ave.,  
Fairbanks,

Attorney for Plaintiff and Appellant.

COLLINS, CLASBY, and SCZUDLO,  
1000 Polaris Bldg.,  
Fairbanks,

Attorneys for Defendants and Appellees.





In the District Court for the District of Alaska,  
Fourth Division

No. 9072

RICHARD E. BENNETT, Administrator of the  
Estate of EVELYN E. BENNETT, Deceased,  
Plaintiff,

vs.

ARCTIC INSULATION, INC., and DELBERT E.  
BOYER, Agent Acting Within the Scope of  
His Employment,

Defendants.

### AMENDED COMPLAINT

The above-named plaintiff, Richard E. Bennett, brings this, his petition, against Arctic Insulation, Inc., and Delbert E. Boyer, agent acting within the scope of his employment, and for cause of action alleges:

#### I.

That the plaintiff is the duly appointed, qualified and acting Administrator of the Estate of Evelyn E. Bennett, Deceased, by virtue of an appointment of the Probate Court of Fairbanks, Fairbanks Precinct, Fourth Division, Territory of Alaska; that Evelyn E. Bennett, died intestate in the said Fairbanks Precinct, Fourth Division, Territory of Alaska, on the 3rd day of October, 1954, and at the time of her death was a resident and inhabitant of said Precinct, Division and Territory.

## II.

That the defendant, Arctic Insulation, Inc., was on the 3rd day of October, 1954, the owner of a certain 1953 Ford Pickup vehicle.

That on said day the defendant, Delbert E. Boyer, agent acting within the scope of his employment, did negligently, and carelessly leave, unlocked, the said vehicle with the keys therein and unattended at Fairbanks, Alaska, that he did so in the area of several night clubs at South Fairbanks, Alaska.

That said Delbert E. Boyer, knew or should have known or should have reasonably foreseen that the vehicle was left in such a place where the same might be removed without consent or authority and that plaintiff might be damaged thereby.

## III.

That on said day, one William F. Harris, a soldier or airman in the United States Service, did steal or assume possession of the said vehicle from the place where the same was left unattended and did carelessly and negligently drive the same on the Richardson Highway to a place about One Hundred (100) feet from an intersection where a road known as the Badger Road intersects with a public highway of the Territory of Alaska, known as the Richardson Highway, and did at said time and place, carelessly and negligently cause the said stolen vehicle to strike the automobile in which plaintiff's decedent was riding, causing fatal injuries which were the direct and proximate cause

of the death of plaintiff's decedent resulting from the negligence of said defendant and each of them as aforesaid.

IV.

That plaintiff further alleges that plaintiff's decedent was a member of the family composed of plaintiff's decedent, plaintiff and Katheryn E. Bennett, born December 18, 1942; and that each of them are still living and by the death of plaintiff's decedent, Evelyn E. Bennett, they were, and are, damaged in the sum of Fifty Thousand (\$50,000.00) Dollars.

Wherefore, plaintiff prays judgment against the defendants in the sum of Fifty Thousand (\$50,000.00) Dollars, and for such other and further relief as to the Court may seem just and equitable.

Dated at Fairbanks, Alaska, this 12th day of September, 1956.

/s/ ROBERT A. PARRISH,  
Attorney for Plaintiff.

Duly verified.

Receipt of copy acknowledged.

Lodged September 13, 1956.

[Endorsed]: Filed September 14, 1956.

[Title of District Court and Cause.]

MOTION TO STRIKE OR DISMISS  
AMENDED COMPLAINT

Now come the defendants, Arctic Insulation, Inc., a corporation, and Delbert E. Boyer, by their attorneys, Collins, Clasby and Sczudlo, and move in the alternative as follows:

1. That the amended complaint of the plaintiff filed in the above-entitled cause be stricken for the reason that it is substantially the same as the complaint originally filed in this case on May 18, 1956, which original complaint was dismissed by order of this court entered on September 4, 1956.

2. That, in the alternative, the above-entitled cause and the amended complaint filed therein be dismissed upon the ground and for the reason that said amended complaint fails to state facts sufficient to constitute a claim for relief against said defendants for the following reasons: (a) No acts of negligence by said defendants sufficient to support said cause are alleged; (b) no purported negligence of said defendants constituted the proximate cause of the death of Evelyn E. Bennett; (c) the wrongful death, if any, of said Evelyn E. Bennett was caused by the negligence of William F. Harris, who stole or assumed possession, without authority, of the vehicle alleged in the amended complaint; and (d) that said defendant Delbert E. Boyer was not acting within the scope of his employment and was not the agent of said defendant Arctic Insulation, Inc., at the time of the accident alleged in said amended

complaint, or at the time that the vehicle described in the amended complaint, as owned by said corporate defendant, was stolen or unauthorized possession thereof taken by William F. Harris.

In support of the above and foregoing motion said defendants do hereby respectfully call to the attention of the court the following:

A. In support of the motion to strike, the court's attention is respectfully directed to the amended complaint. It differs from the original complaint in only the following respects: (1) the introductory paragraph does not state that said amended complaint is filed pursuant to the provisions of Title 4 of the Legislative Reorganization Act of 1946, as amended, known as Federal Tort Claims Act; (2) in paragraph II of said amended complaint, in the fourth line thereof, the words "negligently and carelessly" are added; and (3) in paragraph III of said amended complaint the following words are added at the end of said paragraph "resulting from the negligence of said defendant and each of them as aforesaid."

The court, in open court, prior to the entry of of said order of dismissal of September 4, 1956, indicated that it was not considering as a basis for said order the fact that the original complaint apparently erroneously referred to its being filed under the Federal Tort Claims Act. The other additions above mentioned, made to the amended complaint, do not in any way alter the cause of action as originally stated in the first complaint filed, or

remove the grounds on the basis of which said order of dismissal was entered on September 4, 1956.

Consequently, said amended complaint should be stricken.

B. In the alternative, in the event the court does not deem that said amended complaint should be stricken, then in support of the motion to dismiss said amended complaint on the grounds above stated, these defendants adopt the matters set out in the memorandum brief filed by the defendant Delbert E. Boyer in the above cause on June 12, 1956, the memorandum brief filed by the defendant Arctic Insulation, Inc., in the above-entitled cause on June 27, 1956, and the memorandum reply brief filed by both of said defendants on July 13, 1956, in the above-entitled cause.

The same arguments and citations contained in said memorandum briefs above mentioned apply now in support of the present motion of said defendants to dismiss said amended complaint, since the latter is substantially the same as the original complaint filed in this cause, and the grounds for the dismissal entered September 4, 1956, apply again in the case of said amended complaint.

Dated at Fairbanks, Alaska, this 21st day of September, 1956.

COLLINS, CLASBY and  
SCZUDLO,

By /s/ WALTER SCZUDLO,

Attorneys for Defendants.

NOTICE OF HEARING

To: Robert A. Parrish, Attorney for Plaintiff

Notice Is Hereby Given that the motions of the defendants Arctic Insulation, Inc., and Delbert E. Boyer to strike or dismiss the amended complaint filed in the above-entitled cause will be brought up for hearing in the courtroom usually occupied by the above court on September 28, 1956, at 1:30 o'clock in the afternoon, or as soon thereafter as counsel may be heard. At which time and place you may appear if you see fit.

COLLINS, CLASBY AND  
SCZLUDO,

By /s/ WALTER SCZLUDO,  
Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 21, 1956.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF  
APPEALS UNDER RULE 73 (b)

Notice Is Hereby Given that Richard E. Bennett, Administrator of the Estate of Evelyn E. Bennett, plaintiff above named, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain Order of Dismissal filed herein on the 28th day of September, 1956.

Dated at Fairbanks, Alaska, this 16th day of October, 1956.

/s/ ROBERT A. PARRISH,  
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 23, 1956.

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now, Richard E. Bennett, etc., appellant herein, by his attorney, Robert A. Parrish, and states that the points upon which it intends to rely in this appeal are as follows:

The Court erred in granting defendants' Motion for Dismissal

Dated at Fairbanks, Alaska, this 16th day of October, 1956.

/s/ ROBERT A. PARRISH,  
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 23, 1956.



[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the defendants above, Arctic Insulation, Inc., and Delbert E. Boyer, the sum of Two Hundred Fifty (\$250.00) Dollars.

The condition of this bond is that, whereas the plaintiff has appealed to the United States Court of Appeals for the Ninth Circuit by notice of appeal filed herewith, from the Order of Dismissal of this Court entered the 28th day of September, 1956, and if the plaintiff shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated this 23 day of October, 1956, at Fairbanks, Alaska.

/s/ REUEL M. GRIFFIN,  
Principle;

/s/ DUANE HALL,

/s/ EDGAR M. CLAUSEN,  
Sureties.

Subscribed and Sworn to before me this 23rd day of October, 1956.

[Seal]     /s/ ROBERT A. PARRISH,  
  Notary Public in and for the  
  Territory of Alaska.

My Commission expires February 9, 1960.

Approved:

.....

We, the undersigned sureties, each for himself and not one for the other, say that we reside at Fairbanks, Alaska; that our net worth is the sum of \$1,000.00.

                              /s/ DUANE HALL,  
                              /s/ EDGAR M. CLAUSEN,  
  Sureties.

Subscribed and Sworn to before me this 23rd day of October, 1956.

[Seal]     /s/ ROBERT A. PARRISH,  
  Notary Public in and for the  
  Territory of Alaska.

My Commission expires February 9, 1960.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 24, 1956.

In the District Court for the District of Alaska,  
Fourth Division

No. 9072

RICHARD E. BENNETT, Administrator of the  
Estate of EVELYN E. BENNETT, Deceased,  
Plaintiff,

vs.

ARCTIC INSULATION, INC., and DELBERT E.  
BOYER, Agent Acting Within the Scope of  
His Employment,  
Defendants.

FINAL ORDER OF DISMISSAL AND  
JUDGMENT

This Matter coming on for hearing upon motion of the defendants to strike or dismiss the amended complaint filed in the above-entitled cause and the above-entitled action and upon defendants' motion for costs and attorneys' fees; and the court having examined the files in the above cause and proceedings therein and the briefs filed in said cause, and having heard statements of counsel and being otherwise fully advised in the premises; and it appearing and the court finding that the court heretofore dismissed the complaint filed in the above cause and said cause on September 4, 1956, for reasons stated in the order entered on September 4, 1956, and that the same reasons now apply.

It Is Now Therefore, Ordered, Adjudged and Decreed as follows:

1. That the defendants' motion to strike be and it is hereby denied.

2. That the defendants' motion to dismiss the amended complaint and the above-entitled action be and it is hereby granted, and said amended complaint and this cause be and they are hereby dismissed.

3. That the defendants' motion for costs and attorneys' fees be and it is hereby granted and reasonable attorneys' fees incurred by said defendants be and they are hereby assessed in the sum of \$300.00 and allowed to said defendants as costs, and the clerk is hereby directed to enter as additional costs in favor of said defendants any costs incurred by them as may be disclosed by any cost bill filed by said defendants on or before ten days after date hereof, and judgment therefore against said plaintiff be and it is hereby entered.

4. That pursuant to stipulation of parties made in open court the above and foregoing order and judgment be and it is hereby entered nunc pro tunc September 28, 1956.

5. That pursuant to stipulation of parties made in open court the clerk of this court be and he is hereby directed to include a copy of this order and judgment in the record on appeal being prepared in

this cause in lieu of the minute order entered on or about September 28, 1956.

Done and Entered this 20th day of November, 1956.

/s/ VERNON D. FORBES,  
U. S. District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered November 20, 1956.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings in this cause contained in the Second Amended Designation of Record on Appeal of the plaintiff and appellant, and the additional Designation of Record on Appeal of the Defendants and Appellee, viz:

1. Amended Complaint.
2. Motion to strike or dismiss Amended Complaint.
3. Minute Order of Dismissal of Action.
4. Notice of Appeal under Rule 73 (b).
5. Statements of Points on Appeal.
6. Bond for Costs on Appeal.
7. Final Order of Dismissal and Judgment.
8. Second Amended Designation of Record on Appeal.

9. Complaint.
10. Motion to Dismiss of Defendant Delbert E. Boyer.
11. Motion to Dismiss of defendant Arctic Insulation Co.
12. Order of Dismissal.
13. Brief in Opposition to defendants' Motion to Strike, etc.
14. Defendants' Additional Designation of Record on Appeal.

Witness my hand and the seal of the above-entitled Court this 27th day of November, 1956.

[Seal]       /s/ JOHN B. HALL,  
                       Clerk of Court.

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[Endorsed]: No. 15374. United States Court of Appeals for the Ninth Circuit. Richard E. Bennett, Administrator of the Estate of Evelyn E. Bennett, Deceased, Appellant, vs. Arctic Insulation, Inc., and Delbert E. Boyer, Agent, etc., Appellee. Transcript of Record. Appeal From the District Court for the District of Alaska, Fourth Judicial Division.

Filed and Docketed December 4, 1956.

/s/ PAUL P. O'BRIEN,  
 Clerk of the United States Court of Appeals for the  
 Ninth Circuit.